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In the Supreme Court

of the

United States

October Term, 19[illegible]

No. [illegible]

(No. [illegible])

HELEN DOLMAN, KATHERINE [illegible] FOX, JAMES KEITH [illegible], JR., E. F. R. DUVAL, and KATHERINE [illegible],

Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JAKNEY,

Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 808
(No. 643)

HELEN DOLMAN, LAWRENCE RUST LEE, JAMES KEITH MARSHALL, JR., E. P. R. DUVAL, and KATHERINE HANSBROUGH,
Cross-Petitioners,

vs.

PIOCHE MINES CONSOLIDATED, INC., ELY VALLEY MINES, INC., and JOHN JANNEY,
Cross-Respondents.

CROSS-RESPONDENTS' BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

This case presents difficulties that are unusual because it has to deal with events that cover a period of over thirty years. This results from obstructions to completing an action and counterclaim started in 1940 and still held up.

This must be completed before the stockholders' meeting of the merged companies can be based on a committed list of stockholders. The wrongful default of defendants, which are indispensable parties to a ruling to be reached in the recent litigation, adds to the difficulties, also the confusion and misunderstanding, resulting from withholding from the Court many controlling facts, that have to be dealt with, must be cleared up if justice is to be the end result of these proceedings.

To occupy a reasonable space the mention of a few instances of what the complete record would show, must be used to illustrate a system of procedure, where defamation of a management became a primary objective of a plaintiff who had invested no money in an enterprise, whose claimed stockholder associates have denied giving authority and where for forty years the same management had been satisfactory to investors of hundreds of thousands of dollars under supervision as shown by reports of entirely competent inspectors.

The central point of this case is the counterclaim action which this litigation is holding up and has been held up since the order of the Circuit Court of Appeals handed down in 1953. This deals with occurrences which make up a set of complicated obstructions to corporate financing. These extended from the burning of the Pioche Mine Company's mill in 1929 to the ending of the action on the Bonds which started in 1940 and was settled by agreement in 1943, but has been continued illegally until the Circuit Court of Ap-

peals' order of May 21, 1964 which ordered dismissal and accounting of the Receiver.

The present Dolman action now before the Court is based on the threat that unless the counterclaim was surrendered "ruinous litigation" would follow.

This threat, Exhibit L-2, is contained in a letter dated June 10, 1957, offered in evidence but excluded because of a default, which now is declared error by the Circuit Court of Appeals.

That the Court was misled by statements which should have been questioned, as conflicting with records on the facts testified to, is clearly shown.

The facts were excluded of an effort to establish a mining industry in the face of obstructions which default procedure has concealed and which is held error by the Circuit Court of Appeals in the case of the two defendant corporations and is plainly error in the case of the other defendant who is the President and leading stockholder of the corporation organized to handle these efforts.

Corporate records were ordered taken from the defendant corporation. These records were a necessary part of what had to be introduced to afford a basis for the complaint.

The withheld facts in these records show that the Pioche Mines Company organized in 1908 through a carefully worked out development and equipment plan, and the expenditures of nearly a million dollars of invested money, was fully equipped for a highly economical operation by 1929, when the mill burned.

The last $250,000.00 needed to effectually put the plan into production was offered if a Bond issue could be offered for this block of money.

This Bond issue was allowed as agreed and this is fully set forth in the Articles of Incorporation and Minutes of Incorporation of Pioche Mines Consolidated, Inc.

The properties to be put back of the Bonds issued were not in any instance properties that had been owned by Pioche Mines Company, they were completely separate properties listed in the incorporation papers.

John Janney the President and leading stockholder of Pioche Mines Company since 1908 has served as President and General Manager without salary or compensation by the corporation.

This saving of expense was the reason for the continuation to a successful conclusion, of the plan of development and equipment as is shown by the record of the corporation.

Mr. Janney and a small group of associated stockholders furnished three properties which saved the stockholders' investment at critical periods. He conveyed to Pioche Mines Consolidated the long term lease, he held, on the old mines of Pioche.

In payment he took stock at its par value to represent the exact sums that had been expended on the properties in recent development. The records show that Mr. Janney also has served the Pioche Mines Consolidated as President and General Manager without salary or compenstation.

His stock holdings represent his compensation for a lifetime of effort which has been recognized in many reports, as completely satisfactory, until 20 years after the event when plaintiff Dolman presented her statements which can not be maintained except in a default procedure.

The long tie-up of corporate financing has made necessary the unprecedentedly generous support of some investors. This support is condemned by Dolman in proportion as it is of benefit to the mining efforts.

In relation to this is the charge, which has not been allowed a hearing, that the Dolman action is in aid of the counterclaim conspiracy.

The Dolman untried and false claims are disastrous to the defaulted Pioche Mines Consolidated and are to the advantage of the Trust Company. This for the reason that it shows, or attempts to show, that the Trust Company has had to deal with a management that has been discredited.

It is now clearly established that the accomplishments of the Dolman default procedure has in every instance produced results which are an advantage to the Trust Company and that are contrary to the interests of all investors in all three corporations.

It is shown, by affidavits filed in the case that the wilful neglect and even planned injury, to the properties by an incompetent receiver, which has replaced what the record shows to be a highly competent, efficient management, serving without salary, will if continued destroy all investment by stockholders.

It is also shown that the continuation of the Dolman litigation will make the destruction of this entire effort complete and that this destruction has been brought about by the wrongful use of the processes of the law established for a contrary purpose.

STOCKHOLDERS' MEETING

The counterclaim which the Circuit Court of Appeals ordered in 1953 to be reinstated, is the controlling factor in the matter of stockholders' meetings. Because that counterclaim which has never been permitted to have a hearing, deals with a conspiracy that has obstructed the completion of the merger of three corporations, as provided for in the Settlement Agreement. This merger requires the exchange of securities and until the stock of the three merged companies is turned in, as the basis agreed for exchange, the whole proceedings are held in abeyance.

It is shown that the Dolman action, has held up the prosecution of this counterclaim since 1957, by threats of "ruinous litigation" unless this counterclaim was surrendered. The resulting litigation has prohibited completing the corporate structure so that a stockholders' meeting could be held.

In the meantime the record shows that the stockholders' meetings of the three merged companies is being held in adjourned session until the merger agreement could be completed. This can not be done until the trial of the counterclaim which calls for the Trust

Company to comply with the contract as to the securities it has undertaken to handle.

The Settlement Agreement, provided that a designated board of directors should handle the affairs of the corporations until the merger was completed. One of the directors was to represent the bondholders.

QUESTIONS PRESENTED

The questions presented in the cross-petition do not correctly reflect the facts and circumstances of the case.

I

Question one mistakenly assumes that the default of the Corporations arose from a Notice of Deposition directed to their President.

A. First, the Notice of Deposition of October 5, 1961, which led to the default was *not* addressed to the President of the Corporations (R 688).

Only once was the President's deposition noticed (R 284, notice of October 14, 1960) at which time the deposition of the Secretary-Treasurer was also noticed (R 283) by serving only local counsel (R 285) who sought to withdraw (R 290). No notice of these depositions was given to either the President or to the Secretary (T 178-T 180).

The depositions were set to take place in Pioche, Nevada, when the President was in Leesburg, Virginia, so he did not appear because of the failure of

local counsel to notify him (T 179, lines 6-9). The Secretary was in Pioche, so notwithstanding the lack of notice to him, the deposition of the corporations purportedly *was* taken by and through their Secretary, who is not the Managing Agent (Plaintiff's Exhibit 18).

It was uncontested that the President, Mr. Janney, had no notice (T 179, line 19-T 180, line 4) of this deposition.

This was the only Notice of Deposition that was addressed to either corporation. This Notice was addressed to two officers. The Cross-Petitioner saw fit to proceed through the officer who was not the Managing Agent. It was known to Cross-Petitioner's counsel that the Managing Agent was in the East on corporate business connected to the counterclaim against Fidelity-Philadelphia Trust Company (R 250, R 251). The President got no notice. Therefore, the Motion that was thereafter filed by Cross-Petitioner's counsel to strike the pleadings and enter the default of the corporations on the basis of this non-appearance was denied (R 1378). The corresponding Motion of the corporations for Relief from deposition by Oral Interrogatories Previously Noticed was granted (R 1378).

B. Second: There was no "wilful failure" of the Deponent to appear for the deposition on October 31, 1961 (Notice of Deposition, dated October 5, 1961, which preceded the entry of the default (R 688)). No hearing was ever had on whether the non-appearance

was wilful. The record is uncontradicted that the appearance of the Deponent for his deposition could have killed him (R 756).

In addition, a Motion under Rule 30(b) was on file showing:

(1) Lack of the Trial Court's jurisdiction to proceed under the sworn complaint (T 352:11, R 630);

(2) Failure of the Court and Plaintiff's counsel to honor their respective promises not to allow the Dolman litigation to impede the preparation of Trust Company counterclaim;[1]

(3) Failure of Cross-Petitioner's counsel to select a time for the Notice of Deposition that would allow the Deponent to recover;

(4) The disqualification of the attorneys to take the deposition (this matter is treated later herein);

(5) The pendency of Motions that showed that the Plaintiff bringing the action had no standing to sue and was in Court pursuant to extortionate threats and by virtue of fradulent false sworn statements (R 495, R 654, R 700).

The "judicial description" (Cross-Petition, pp. 2, 3) of the non-appearance "as a direct flaunting of the Court's authority" (page 3) is a description that is not based upon a hearing or notice to the party charged.

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[1]These statements are set out in footnote 16 of Petitioners' Answer to Opposition, etc. in case Number 643.

It confuses two entirely different questions: The recommendation that defendant Janney not appear for a deposition (that his Physician advised could kill him), is confused with the proposal that defendant Janney appear for a physical examination, which required adequate notice. Such notice was never tendered. Only a delay of "a few days" to allow a *deposition* was tendered, when submitting to a deposition at that time could have killed the deponent (R 756).

The reason for respondent Janney's *inability* to appear for physical examination on half-day's notice from Houston, Texas, was the impossibility of performance (T 430, T 431) of the Order (T 464, lines 7-17).

The confusion of these two distinct matters appears to be based upon a misapprehension of the record (see, for example, footnotes 14 and 17 of "Petitioners' Answer to Opposition to Petition for Writ of Certiorari," October term, 1964, No. 643).

An attorney who would have recommended to an eighty-odd year old client to appear at a deposition when he was seriously ill, would be derelict in his duty.

C. Third, it is more than "at one point" that "counsel stated that no such relief (as default) was being asked against the corporations" (Cross-Petition, page 3).

In ordering the medical examination of Cross-Respondent Janney, the Trial Court stated at T 408:19-25:

"Now, in the event of the failure of Mr. Janney to submit to such examination at the time and place which is indicated, in Las Vegas, Nevada, at the place designated by the Doctors who may be called upon to make the examination, the Court, on application of the Plaintiff, will strike the pleadings of the said John Janney—aren't those corporations of which he is an officer made defendants?" (T 408:19-25).

In response to this inquiry, Counsel for Cross-Petitioner states:

"Mr. O'Connor. They are made defendants, but there is no relief prayed against the Corporation, *and the only Answer filed is an Answer by John Janney . . .*" (T 409:1-3, emphasis added).

At T 409:8-12 the following colloquy then takes place:

"Your Motion is directed to strike the pleadings of defendants.

Mr. O'Connor. *That is an error.*

Court. It is the pleadings of said John Janney?

Mr. O'Connor. *That is the only one that has been filed.*" (T 409:8-12, emphasis added).

After this statement of Counsel for Cross-Petitioner that the request to strike the pleadings of the corporations was a mistake, the Court caused the above-quoted passage from T 408:19-24 of the Transcript to be re-read three separate times. These re-readings occurred at T 409:18, T 409:24 to 410:5. Thus, the Court was led to believe that only the pleadings of John Janney were involved, NOT the Corporations.

When counsel for Cross-Petitioner represented that the pleadings of John Janney "is the only one that has been filed" (R 409:12), he omitted to consider the following facts shown in the record:

> This attorney had moved Judge Ross to strike portions of the corporations' Counterclaim that were contained in their Answer (R 212); he had, in concert with his client, communicated in circular letters to the stockholders (R 228, R 432) in an effort to mend a fatal defect of the complaint, which defect had been set forth in the corporations' Counterclaim (R 63:11-17); after the entry of the Opinion and Order of the late Judge John Ross, sustaining the correctness of the statements contained in the corporations' Counterclaim, this same counsel for Cross-Petitioners herein filed, on October 17, 1960, an Amended Complaint (R 623) seeking to cure this fatal defect by using the names of new stockholders that were necessary to maintain the suit (see Opinion, page 28), but who in fact had never employed said counsel or given their consent to the suit;[2] Counsel then filed an answer to the Counterclaim of the Cross-Respondent mining corporations (R 243), which was verified by his client, Helen Dolman (R 247); and after his client and the mining corporations were at issue on the Counterclaim of corporations, said counsel served a Notice of Deposition *upon* the

[2]The affidavits of these four "co-plaintiffs" affirmatively repudiating the claimed authority of said counsel are set out in Cross-Respondents' Brief, "Petitioners' Answer to Opposition to Petition for Writ of Certiorari, footnotes 5-9, and related text, Case No. 643.

> Cross-Respondent corporations, when they were the only parties who, at that time, had appeared in the action (R 282).

Counsel's representation to Judge Foley that the Answer and Counterclaim of the Cross-Respondent corporations did not exist was, however, not the end of said counsel's oversight.

When the written order was presented to Judge Foley for signature, two days later (R 745), it provided:

> "Now, Therefore:
> It Is Hereby Ordered That defendants' pleadings be stricken, default entered and this matter set for hearing on November 7, 1961, . . ." (R 747.)

Thus, the Answer and Counterclaim of the corporations, which had been represented to the Trial Court not to exist, was struck through the change made by Cross-Petitioner's counsel in a written order that did not follow the oral instructions of the Judge (T 508, T 409).

II

The second "question presented" asserts that the default receivership was, "to protect the corporate interests pending a stockholders' meeting" (Cross-Petition, page 3). The default receivership did *not* protect the corporate interests:

1. No bond was required of those seeking the receivership to protect the corporations against the extensive damages that have arisen out of the

wrongful appointment. The receiver's bond is security only against the receiver's wrongful acts, and covers only a part of this damage. There was no bond whatever to cover the damages arising out of the wrongful *appointment* by default.[3]

2. The bond required of the receiver was grossly inadequate to protect the corporate interests against the damages deliberately inflicted upon the properties (R 1240ff, R 1215, 1217ff). The properties which were in good repair when the receiver took over (T 1883, T 1896) have been allowed by the Receiver to fall into disrepair and two and

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[3]In referring to the injunctive provisions on which no Cross-Respondent was heard, the Opinion states:

"the (receiver's) bond, however, is not the customary form of bond issued when an injunction is obtained." (Opinion, page 27)

The *reason* it is not the "customary form" is because a receiver's bond fails completely to give any protection whatever to the parties who are entitled to protection *from the damages arising from a restraining order* (Rule 65(c), F.R.Civ.P.).

The receiver's bonding company is liable on the bond only to the extent of the receiver's defalcations. If he performs correctly, the Corporations and their President can each be damaged by the restraining order, and no liability whatever will arise on the receiver's bond to protect them.

The Opinion concludes (page 27) that the President of two corporations may be enjoined without either the corporations or the President being heard, on the basis that:

"there are findings that he has wrongfully done so (disposed of corporate assets) as to Pioche, . . . etc." (Opinion, page 27)

Yet these "findings" were made with all defendants defaulted, on the basis of the misrepresentations by an attorney to the Court (see introduction to "Petitioners' Answer to Opposition for Writ of Certiorari, case number 643), without either pleading or proof to support the representations, while the defendants are prevented from exposing the falsity of the representations on the basis of the default (e.g., T 710, T 711. Other examples appear under the heading "Default Excluded All Petitioners" in "Petitioners' Answer to Opposition to Petition for Writ of Certiorari," case number 643).

one-half million dollars of damage, or more, is threatened from this neglect (see, for example, "Motion to Remove Receiver, Compel Restoration of Funds, and for Citation of Receiver for Civil Contempt" (part of Vol. 25 of Transcript of Record)).

3. Cross-Respondents were not allowed to show that the corporate interests had been fully protected by the management that was replaced. Cross-Respondents were not allowed to show that, despite the lack of corporate funds with which to protect the properties, funds were advanced by the management replaced, when funds were not available from any other source, and the properties were completely protected at a small fraction of the sums spent by the receiver. Cross-Respondents were not allowed to require a showing of "immediate, irreparable injury" which is required for the entry of even a restraining order, let alone a default receivership.

4. The receiver deprived the properties of fire protection (R 1206, R 1215, R 1218, R 1221); drove the corporations' resident watchman off the properties; converted receivership funds to his own use and to the use of his principal Helen Dolman (R 1193ff. See also Motion to Remove Receiver, Compel Restoration of funds etc.); failed to preserve the right of the corporations to their unpatented mining claims; and failed to carry out the instructions of the Trial Court and the instructions of the Court of Appeals on its

order on Motion for Order to Preserve Status Quo Pending Appeal (attached as Exhibit A to Motion to Remove Receiver, etc., Vol. 25,).

5. The only benefit that was gained by anyone out of the receivership was that gained by Fidelity-Philadelphia Trust Company in being protected, during the receivership, from accountability on the counterclaim.

In addition, the Receivership was not limited to any such purpose as "pending a stockholders' meeting." As the Court of Appeals observed (Opinion, page 25):

> "A receivership is not an end in itself; it is but a means to an end. Here no end was sought. Under the judgment, none is in sight." (Opinion, page 25).

The only "end" that has *resulted* from the receivership has been the protection of the Trust Company from accountability on the counterclaim that is still pending against that Bank.

According to this counterclaim, filed by Cross-Petitioners' counsel when representing Pioche Mines Consolidated, Inc. and John Janney, *the wrongful acts of the Trust Company* are asserted to be the reason why the stock structure of Pioche Mines Consolidated, Inc. is clouded and indefinite:

> "Fidelity-Philadelphia Trust Company acting in collusion with Debenture Holders' Committee, retained said Income Bonds *and said shares of stock* and refused to exchange them." (R 5:25-29, emphasis added).

This Settlement Agreement is still not performed, and the obstruction of this agreement *by Fidelity-Philadelphia Trust Company* is one of the elements of damage *formerly* asserted by Cross-Petitioners' counsel on behalf of their then-clients, Pioche Mines Consolidated, Inc. and John Janney.

Finally, there is neither allegation nor proof in the record to support a receivership "pending a stockholders' meeting," which the Cross-Petition now asks this Court to direct by default.

III

The third "question presented" assumes that the receiver has expended money on the corporations' behalf, rather than squandering corporate funds in his own behalf.

The "question" assumes that the Receiver has "carried out his duties;" whereas the Receiver wholly failed and neglected to carry out his duties and preserve the corporate properties.

The Opinion of the Court of Appeals would fully protect a *bona fide* receiver, who had complied with the lawful orders of the District Court and the Appellate Court. The Opinion provides:

> "That those costs of the receivership that would not have arisen but for the appointment *should be charged against the party invoking the receivership, here the appellees.*" (Opinion, pages 31, 32).

The corporations deny that the receiver has acted "in good faith," and assert that the principal purpose of the receivership has been to protect the Trust Com-

pany by destroying corporate assets that otherwise could finance the prosecution of the counterclaim, and by allowing the receiver's attorneys to take over their former clients' counterclaim against the Trust Company.

IV

The corporations should also be heard on the statements assumed to be true in the fourth "question presented."

Pioche Mines Consolidated, Inc., denies that the judgment is any "benefit" to that corporation.

It is no longer contended that the action in any way "benefits" Ely Valley Mines, Inc. Yet both corporations were sued herein. The Cross-Petition seeks to restore a receivership of both corporations without their having been heard.[4]

Cross-Petitioner Dolman also asks this Court to "compensate" her "for the value of her services and those of her attorneys" (Cross-Petition, page 3), again, without Cross-Respondents being heard.

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[4]The Trial Court refused to hear Cross-Respondents on the question of receivership, because of the default:

"Mr. O'Connor. . . . Now, with the Court's permission I would like to address myself to our application for the appointment of a receiver. . . .

Mr. Horton. Can we be heard on that question?

Court. *No, it is a default case. You are in default.* . . .

Mr. Horton. *We would like to put on evidence in regard to this.*

Court. *No, you are not going to put on evidence at all. You are in default.*

Mr. Horton. *I would like to correct facts that have been misrepresented by counsel and not supported by the evidence.*

Court. *You are observers as far as all objections in this case are concerned, . . .*" (T 1579, T 1619, T 1620; emphasis added).

The only "services" rendered by Cross-Petitioner Dolman, who is not qualified to bring this action, are those she performed for Fidelity-Philadelphia Trust Company in protecting that corporation from accountability on a counterclaim.

Cross-Respondents deny that she has expended any funds "in the corporation's behalf," (Cross-Petition, page 3) but that those funds were supplied by said Trust Company to carry out said Dolman's extortionate threats to "stir up the stockholders" and to prevent the collection of the counterclaim against that Bank. And the corporations have not been heard on these issues.

The record shows clearly that "Dolman had no standing to prosecute the action" (Opinion, page 28) and further shows:

> "It was only because she and her counsel brought in other stockholders . . . that the Court could proceed to judgment against Janney. The record also shows that the other stockholders were brought in by Dolman and her counsel on the express representation and understanding that there would be no expense to them." (Opinion, page 28)[5]

Cross-Petitioner Dolman has invested no funds in the Cross-Respondent corporations, and procured her

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[5]The Cross-Petition protests (page 7) that the stockholders whose names were used in this case without authority are not "in a position to compensate" for the charges which the Appellate Court has ordered to be assessed against them.
Cross-Petitioner's statement brings into clear focus the nature of the representations of Dolman and her counsel in attempting to induce stockholders to join, "on the express representation . . . that there would be no expense to them." (Opinion, page 28)

stock through fraud. To allow such a party to carry out her extortionate threats against the corporations without complying with the requirements of Rule 23(b) or allowing the corporations to be heard, would require the exercise of legislative authority. No Court has such authority.

COMPENSATION SOUGHT FOR COUNSEL WHO ARE ACTING AGAINST THE INTERESTS OF FORMER CLIENTS

The request for attorneys' fees to Cross-Petitioner's counsel should be considered in the light of the nature of the case in which the fees are sought.

The Court of Appeals states:

> "We might feel, if we were counsel, we should not have participated in the present litigation" (Opinion, p. 12).

However, the Court of Appeals says with regard to the counterclaim wherein Cross-Petitioner's counsel represented Pioche Mines Consolidated, Inc. and John Janney:

> "We have examined the counterclaim in the Fidelity case, which is in the transcript (R 2), and we find that the issues there are quite different from the issues here." (Opinion, p. 12).

It is true that *some* of the issues are different. It is also true that *other* issues are identical, and counsel who once undertook to represent Cross-Respondents with regard to these issues, have now undertaken employment wherein they assert the exact *opposite* of the position that they once undertook to defend. The

former clients were not heard, because of the default, on the issues where said counsel had changed sides.

These attorneys frankly admitted that the principal object of their second client was "largely accomplished" when they obtained control of their former clients' counterclaim that had not yet been brought to trial (see footnote 7).

Examining the *pleadings* to determine the conflict of interest between the two sides that had been represented by counsel, apparently did not reveal with sufficient clarity the following *similarity* of issues. This similarity would have been revealed at a hearing on the merits, where *proof* rather than *pleading* would be the test. This hearing has been denied all Petitioners, and could have shown:

(a) In the counterclaim filed by Cross-Petitioner's attorneys against Fidelity-Philadelphia Trust Company (R 2, R 26, lines 20, 24, 25, 29-31) *Cross-Petitioner's counsel undertook to show that the Ely Valley Mine belonged to John Janney;*[6] they now assert that he held it in Trust for

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[6]In the counterclaim filed by Cross-Petitioner's counsel on behalf of John Janney, it is averred:

"This defendant owns more than one-fifth of the issued capital stock of Pioche Mines Consolidated, Inc. and has since its incorporation, supervised and managed its operations, and *a large part of the money invested in its development has been invested because of this defendant's good name and reputation as a mine manager.*

"*This defendant also owns interests in other mining properties* and prior to the acts of Fidelity-Philadelphia Trust Company as herein set forth, had earned and *acquired a reputation as a capable and successful mine manager,* and, *this favorable reputation is an important asset* and of special value *in association with the ownership of mining property* or other mining interests." (Counterclaim against Fidelity-Phila-

someone else; "wrongfully converted the said mine for his own use and purposes"; and "at all times involved herein, defendant John Janney wrongfully concealed . . . the true facts concerning his wrongful misappropriation of the Ely Valley Mine" (Opinion, page 21).

(b) In the counterclaim filed by Cross-Petitioner's attorneys, they undertook to prove that the *wrongful acts of the Trust Company* caused Pioche Mines Consolidated "properties to depreciate in value and saleability" (R 10, line 20), and the amount of this reduction in the value of the assets of the Pioche Mines Consolidated is set at $4,000,000 (R 7, lines 2-4; R 14, lines 14, 15; R 23, lines 15-19).

In the instant case, Cross-Petitioner's *now* assert that the reduction in the value of the assets of one of their former clients, Pioche Mines Consolidated, was *not* due to the wrongful acts of the Trust Company conspiracy, but was due instead (to the extent of "in excess of One Million Dollars ($1,000,000.00)" (Opinion, page 21)) to the fact that *another* of their former clients, John Janney, had "converted" a mine belonging to

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delphia Trust Company, signed and filed by Cross-Petitioner's counsel, R 26, lines 14-25)

The proof, if a hearing had been allowed, would have shown that the "interests in other mining properties" above referred to had, as its principal reference, *the interest of John Janney in the Ely Valley Mine*, which said counsel now represent was *not* owned by their former client John Janney, but was in fact owned by their former client Pioche Mines Consolidated, Inc. Yet neither former client was allowed a hearing on this matter or upon the qualification of Cross-Petitioner's counsel to assert the claim.

Pioche Mines Consolidated, and "wrongfully used" over $1,000,000.00 therefrom "for his own purposes" (Opinion, page 21).

Every cent of the million dollars' damage asserted in this second case *detracts from* the measure of damage formerly asserted by Cross-Petitioner's counsel *on behalf* of Pioche Mines Consolidated, Inc. in the first case—This measure being the difference between the value of corporate assets before the acts complained of on behalf of Pioche Mines Consolidated, compared to this value after the Trust Company's acts had done their damage. Cross-Petitioner's counsel now assert that *during this time,* the assets of Pioche Mines Consolidated were depleted to the extent of "over one million dollars" by the defalcations of another of their former clients, President Janney, whose "good name and reputation" they also at one time undertook to vindicate from the very same calumnies that they now assert. Yet the default prevented either one of their former clients from defending against either the conduct of their former attorneys, or their charges.

(c) Part of the *proof* of the conspiracy-counterclaim filed by Cross-Petitioner's attorneys against Fidelity-Philadelphia Trust Company was that the efforts of the Trust Company were aimed at "financially crippling Consolidated so that it could be taken over cheaply by the debenture-holders" (202 Fed. 2d 944, 946).

The financial burdens heaped on the corporations by the litigation held wrongful (202 Fed 2d 944, 206 Fed 2d 366, 237 Fed 2d 164) were such as "would kill any ordinary corporation" (T 97, lines 4-8).

Part of the *proof* of the Trust Company counterclaim formerly pleaded by Cross-Petitioner's counsel was, (1) that the reason for the failure of the conspiracy to achieve its object against Pioche Mines Consolidated was the willingness of John Janney, its President, to sacrifice several farms and properties owned by him, and authorize the use of one of his mining properties, the Ely Valley Mine, to defeat the action of the debenture holders; and (2) that with this help, and by serving as President without salary, these obstacles were overcome.

However, in the instant litigation, said counsel claimed: "they take five million dollars, approximately, out of the Ely Valley Mine and that goes into John Janney's pocket" (T 541, 2-4); and that corporate financial arrangements had been blocked by Mr. Janney and "that those transactions had not gone through because of John Janney's demand for personal benefits on top of the purchase price to the corporations" (Opening Statement in Dolman case. T 542, 22-24).

Yet all defendants are defaulted on such charges, when brought by attorneys who formerly undertook *on behalf of* their former clients *to prove: "a large part of the money* ('in excess of

> $1,000,000.00') *has been invested because of this defendant's good name and reputation* as a mine manager" (Counterclaims of Pioche Mines Consolidated, Inc. and John Janney, R 26, 10-18).
>
> Thus, the reason for *the ability of the corporation to acquire funds*—the "good name and reputation" of its President (Counterclaim, R 26)—is directly attacked by these former attorneys, without either their former client that benefitted from this reputation or the former client who had this reputation being heard, because the default of the two former clients was obtained by these former attorneys through noticing a deposition *after* they learned that their former client was ill and would need time to recover from a sickness that "could have resulted in his death" (R 756).

Matters of this nature cannot be correctly determined in default proceedings where proof is not required of the new allegations of the former attorneys, and where proof of the opposite position is not allowed to be advanced by the former clients.

Cross-Petitioner's counsel changed sides in the same suit, and sought to and obtained, control of their former clients' counterclaim.[7]

Serious though complicated questions of professional ethics are involved here. They are not such as can be determined by an examination of the pleadings,

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[7](T 2699, lines 11-16), where the object of the Dolman litigation is announced to be "largely accomplished" when the Court directed these attorneys to "take over" the counterclaim of their former clients against the Trust Company. See also T 2696, lines 19-25.

without ever having a hearing requiring *proof* of either party's contentions.

Cross-Respondents should not be penalized because they sought to present the question of the disqualification of Cross-Petitioner's counsel as a preliminary matter by filing a motion under Rule 30 (b). This course was called for in order to avoid possible claim of waiver that might arise by proceeding further in a case where counsel were disqualified, and was also necessary to protect the deponent's health.

If the advice of the attorney to his client that he need not jeopardize his health by coming in person was wrong, then $1,000,000 penalty (based on the "sketchy pleading" (Opinion, p. 21) of a claim based on fraud by a party's former counsel, in a case which showed lack of jurisdiction), is too strong a penalty to be applied for following this bad advice. Inflicting this penalty without allowing the party to be heard is taking of property with due process of law, as is the appointment of a receiver.[8]

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[8]U.S. Constitution, Amendments, 5, 14; *Windsor v. McVeigh*, 93 U.S. 274, 276-8; *Hovey v. Elliot*, 167 U.S. 409, 413, 414, 417; *McVeigh v. U. S.*, 11 Wall. (78 U.S.) 259, 267; *Nottebaum v. Leckie* (CCA 3, 1929), 31 Fed. 2d 556, Cert. den. 280 U.S. 558, 74 L. Ed. 613, 50 S. Ct. 17; *Duell v. Duell* (CCADC, 1949), 85 App.D.C. 78, 178 Fed. 2d 683, 14 ALR 2d 560; *Noxon Chemical Co. v. Leckie* (CCA 3, 1930), 39 Fed. 2d 318, Cert. den. 282 U.S. 841, 75 L. Ed. 747, 51 S. Ct. 22; *Union Mutual Life Ins. Co. v. Union Mills Plaster Co.* (1889), 37 Fed. 286 (5), 3 LRA 90; *Central West Publishing Co. v. Craig* (CCA 8, 1924), 70 Fed. 2d 427, 429; *Marion Mtg. Co. v. Edmunds* (CCA 5, 1933), 64 Fed. 2d 284, 251; *Tozer v. Charles A. Krause Mill Co.* (1951), 189 Fed. 2d 242; Canons of Judicial Ethics, Canon 16; 5 *Alderson on Receivers*, Section 52, pages 81, 82; 1 *Clark on Receivers* 127; 16 *Fletcher*, Cyclopedia Corp. 69.

Attorneys who bring suits of this nature are entitled to no award for "counsel fees."[9]

CORPORATE REMEDIES WERE NOT EXHAUSTED

At page 25, the Opinion states:

> There is a charge that Janney controls the corporations and their boards of directors, and has abandoned them and their properties, and that he has profited at their expense. But for all that appears, upon termination of his control by an injunction, or even without it, the stockholders would be able to meet, elect new boards of directors, and conduct the affairs of the corporations as they deem best. Nothing in the complaint indicates that they would not. In this respect, the motion for the appointment of a receiver, filed as a part of the motion for default judgment, adds little. It indicates that plaintiff Dolman has obtained a list of stockholders, has ascertained the addresses of many of them, and holds their proxies. For all that appears, they can control the corporations.

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[9]Cross-Respondents submit that the only review that would be proper of the disposition made by the Court of Appeals on the matter of attorneys' fees would be to set aside any award for fees and for any relief on the Complaint.

Cross-Petitioner's Trial Memorandum (R 773) admitted that their Nevada counsel had been paid in full under his contract of employment and was entitled to no further compensation. Cross-Petitioner's Memorandum stated:

> "no further recovery is sought for him in this action." (R 802)

But the Trial Court, *sua sponte*, directed:

> "the sum of Fifteen Thousand Dollars ($15,000.00) is hereby ordered and adjudged to be paid to (local Nevada counsel)." (R 1241)

Cross-Respondents cannot find any precedent for granting an attorney compensation above and beyond what he agreed to serve for, and what was asked.

Thus, even in a default proceeding, where the Cross-Respondents were wrongfully excluded, the record made by Cross-Petitioner Dolman does not prove the allegations that it is necessary that she prove in order to sustain a secondary action under Rule 23 (b) F.R. Civ. P.

If, "for all that appears, they (Cross-Petitioners) can control the corporations," then there is a corporate remedy available for the purported wrongs, and there is no standing to sue in equity in a derivative capacity.

When to this is added the fact that Cross-Petitioner Dolman flatly *refused* to state her grievances to the stockholders,[10] and the fact that the stockholders who were claimed to have authorized the action, and who were indispensable to the maintenance of the action, have each repudiated the claimed authority of counsel for Cross-Petitioner Dolman to represent them, it would appear that the only disposition of the instant case that may properly be made under Rule 23 (b) is to dismiss it.

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[10]Extracts from the stockholders' meeting where this refusal appears are given in footnote 1 of "Petitioners' Answer to Opposition to Petition for Writ of Certiorari", case No. 643.

THE CROSS-PETITION SHOWS NO BASIS FOR THE DEFAULT RECEIVERSHIP

If, the Cross-Petitioners insist, the action of the District Court "left (the corporations) without anyone effectively responsible for carrying on corporate affairs or protecting corporate interests," (Cross-Petition, p. 11), this is further demonstration of the error of excluding the corporations from their right to oppose the action. It is certainly *not* an argument for continuing a receivership on which they were not allowed to be heard.[11]

The Cross-Petition asserts that Mrs. Dolman "developed and perfected the litigation by joining appropriate shareholders as co-plaintiffs" (Cross-Petition, page 13). This statement should go on to say, "without either their knowledge or their consent."

In addition to the several substantial reasons cited by the Court of Appeals for reversing the receivership (Opinion, pp. 24-26), other reasons, equally as compelling, also required his dismissal:

> The Receiver was the agent (R 436) of the party who brought the action pursuant to her extortionate threats (R 1267, par. 8, T 2239: 18-T 2240:11, R 1268, T 3044, T 3045), and was totally unfamiliar with mining matters (R 1220).
>
> The purported purpose of the Receiver's appointment was to preserve the properties and save expense. The Receiver then neglected the properties, multiplied expenses with lavish unau-

[11]See footnote 4 above.

thorized expenditures, and sought and obtained from Trial Court an Order that would result in the destruction of Two and One-Half Million Dollars worth of mine development work (T 1641-T 1643) and many hundreds of thousands of dollars worth of modern improvements, in order to reimburse said Receiver for his expenditures that had been neither authorized nor approved.

Whereupon, the Court of Appeals, in order to avert this destruction of the corporate properties, on December 5, 1963, entered its order, "On Motion for Order to Preserve Status Quo Pending Appeal" in which it was ordered:

> "the sale of any such equipment, supplies and buildings which may be indispensable to preserve the underground workings of such mine properties . . . is stayed . . ."
>
> "no equipment, supplies and buildings may be sold during the pendency of these Appeals . . ." (Exhibit A, attached to Motion to Remove Receiver, Compel Restoration of Funds, etc., Vol. 25 of Transcript of Record).

For the Court of Appeals to have sanctioned such a Receivership would be a substantial departure from the former equity practice that is adopted by Rule 66, F.R. Civ. P.

CONCLUSION

For the reasons above it is respectfully submitted that if this Honorable Court grants certiorari on the Cross-Petition, it should be limited to the sole question of whether the Opinion below should be reversed and remanded with instructions to dismiss.

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